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IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]104

JOHN G. BRODY,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT

SOL GELB,
HARRIS B. STEINBERG,
Attorneys for Appellant,
25 Broad Street,
New York 4, New York.

HARRIS B. STEINBERG,
LEO H. HIRSCH, JR.,
of Counsel.

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TABLE OF CONTENTS

	PAGE
(a) Opinions Below	1
(b) Grounds of Jurisdiction	2
(c) Question Presented	3
(d) Statement of the Case	3
(e) The Federal Question Is Substantial	5
Exhibit A	12
Exhibit B	35

Authorities Cited

Cases

Abbate v. United States (1959), — U. S. —, 3 L. Ed. 2d 729	11
Bartkus v. Illinois (1959), — U. S. —, 3 L. Ed. 2d 684	11
Benanti v. United States (1957), 355 U. S. 96	5, 7, 8, 11
Frank v. Maryland (1959), — U. S. —, 3 L. Ed. 2d 877	2
Home Insurance Co. v. Dick (1930), 281 U. S. 397	3, 10
Kunz v. New York (1951), 340 U. S. 290	3
Michigan-Wisconsin Pipe Line Co. v. Calvert (1954), 347 U. S. 157	3
Morisette v. United States (1952), 342 U. S. 246	7
Pennsylvania v. Nelson (1956), 350 U. S. 497	6, 7, 8

PAGE

People v. Clemente (1st Dept. 1954), 285 App. Div. 258, 264-265, aff'd 309 N. Y. 890 7
People v. Flack (1891), 125 N. Y. 324 7
People v. Walker (1910), 198 N. Y. 329 7

Reconstruction Finance Corporation v. County of Beaver, Pa. (1946), 328 U. S. 204 2
Rice v. Santa Fe Elevator Corp. (1947), 331 U. S. 218 6

San Diego Building Trades Council v. Garmon (1959), — U. S. —, 3 L. Ed. 2d 775 ..... 7, 9
Schwartz v. Texas (1952), 344 U. S. 199 11
Speiser v. Randall (1958), 357 U. S. 513 3
Stemmer v. New York (1949), 336 U. S. 963 11
Sully v. American National Bank (1900), 178 U. S. 289 ..... 3, 10

United Automobile Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board (1956), 351 U. S. 266 7

Whitfield v. Ohio (1936), 297 U. S. 431 ..... 3, 10

Young v. California (1939), 308 U. S. 147 3

Statutes

Federal Communications Act, Sec. 605 ..... 5, 7, 8, 11

New York State Penal Law:
Sec. 522-a 2, 3, 4, 5, 7, 8
Sec. 580, subdiv. 1 ..... 2, 3, 4, 5, 7, 8
Sec. 1423, subdiv. 6 ..... 2, 3, 4, 5, 7, 8

28 U. S. Code, Sec. 1257(2) 2, 10

Constitutional Provision

Article VI, Clause 2 ..... 3, 4

Fifth Amendment 11

IN THE

Supreme Court of the United States

October Term, 1958

No.

JOHN G. BROADY,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT.

(a) Opinions Below

Neither the court of original jurisdiction, the Court of General Sessions of the County of New York, nor the intermediate appellate court, the Appellate Division of the Supreme Court of the State of New York, First Department, wrote an opinion herein.

In the Court of Appeals of the State of New York, three opinions were written. None of said opinions has yet been reported officially or unofficially. These opinions are annexed hereto as "Exhibit A."

By order dated the 14th day of May, 1959, the Court of Appeals granted a motion to amend the remittitur herein by adding the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Con-

stitution of the United States, namely: Whether New York Penal Law, section 1423, subdivision 6, as interpreted by this court herein, is unconstitutional as offending against the 'supremacy clause'—Article VI, Clause 2—of the Constitution of the United States."

This action is reported in New York Law Journal, May 18, 1959, page 11, but has not otherwise been reported officially or unofficially, as yet.

(b) Grounds of Jurisdiction

I. This is a criminal proceeding brought pursuant to sections 580, subdivision 1; 1423, subdivision 6; and 522-a of the Penal Law of the State of New York. Copies of such sections, so far as here relevant, are annexed hereto as "Exhibit B."

II. The final order of the Court of Appeals was made and entered on the 9th day of April, 1959. No application was made for rehearing. The notice of appeal was filed on the 26th day of May, 1959 with the Clerk of the Court of General Sessions of the County of New York, with whom all papers in this proceeding have been filed.

III. The jurisdiction of this Court in invoked under 28 U. S. Code, Section 1257 (2).

IV. Cases believed to sustain the jurisdiction include:

Reconstruction Finance Corporation v. *County of Beaver, Pa.* (1946), 328 U. S. 204;
Frank v. *Maryland* (1959), — U. S. —, 3 L. Ed. 2d 877;

Speiser v. *Randall* (1958), 357 U. S. 513;
Michigan-Wisconsin Pipe Line Co. v. *Calvert* (1954), 347 U. S. 157;
Kunz v. *New York* (1951), 340 U. S. 290;
Young v. *California* (1939), 308 U. S. 147;
Whitfield v. *Ohio* (1936), 297 U. S. 431, 435-436;
Home Insurance Co. v. *Dick* (1930), 281 U. S. 397, 407;
Sully v. *American National Bank* (1900), 178 U. S. 289, 298.

V. The state statute, the validity of which is involved, is New York Penal Law, section 1423, subdivision 6, the text of which is set forth in "Exhibit B."

(c) Question Presented

Whether New York Penal Law Section 1423, subdivision 6, as interpreted by the Court of Appeals herein, is unconstitutional as offending against the "supremacy clause"—Article VI, Clause 2—of the United States Constitution.

(d) Statement of the Case

Appellant, John G. Broady, a lawyer who has automatically been disbarred as a result of the present felony conviction, was brought to trial under an indictment containing 20 counts of wiretapping, keeping a place for wiretapping and possession of wiretapping instruments. The trial was a lengthy one and the evidence produced showed that a plant existed in New York City, equipped for illegal wiretapping of business and home telephones in the City of New York. Three men—Shannon, Ruh and Asmann,

technicians in telephone communications—actually operated this plant. The People's case was based on the theory that Broady, the appellant, was the employer of these men, and that the conversations of various people were tapped in this operation.

The trial court charged that if the tapping of the telephones, without the consent of the subscribers, was done at the instance of the defendant, intentionally and knowingly, then he was guilty of the crime of wiretapping charged in the indictment pursuant to section 1423, subdivision 6, of the Penal Law. The trial court defined the element of "willfulness" in the statute, as being synonymous with "intention", as opposed to "malice" (ff. 4626-7, 4669), despite the fact that the wiretapping prohibition is found in an article of the Penal Law entitled "Malicious Mischief". An exception to this definition was noted (ff. 4691-2).

The jury convicted appellant on 16 counts of the indictment and failed to agree on one. Three counts were dismissed by the court and were not submitted to the jury. The appellant was sentenced to two to four years in State Prison on two of the wiretapping counts, pursuant to section 1423, subdivision 6.

The present contention as to the invalidity of section 1423, subdivision 6, of the New York Penal Law as being in violation of the supremacy clause of the United States Constitution was not made until the appeal in the New York Court of Appeals (Appellant's Brief, New York Court of Appeals, Point I, pages 11-34 inclusive). Nevertheless, it was considered and necessarily passed upon by that court, as indicated by all three opinions, to wit, the

majority opinion by Judge FROESSEL and the two dissenting opinions by Judges FULD and DESMOND; moreover, the conviction would necessarily fall if the statute were unconstitutional.

The majority opinion in the Court of Appeals recognized that the present contention on this appeal was "the more serious question" involved in the appeal:

> "This brings us to the more serious question involved in this case, namely, whether the prohibition against wiretapping contained in section 1423, subdivision 6, intended to prevent invasions of privacy, was preempted by section 605 of the Federal Communications Act."

The majority of the Court of Appeals held that section 605 of the Federal Communications Act did not preempt the prohibition against wiretapping contained in section 1423, subdivision 6, of the New York Penal Law.

(c) The Federal Question Is Substantial

In *Benanti* v. *United States* (1957), 355 U. S. 96, Chief Justice WARREN wrote as follows (355 U. S. at pp. 104-106):

> "The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under §605, that portion of the statute pertinent to this case applies both to intrastate and interstate communications. Weiss v. United States (308 U. S. 321), supra. The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted

> in Weiss (308 U. S., at 328), the interceptor cannot discern between the two and will listen to both • • •. Respondent points to portions of the Act which place some limited authority in the States, over the field of interstate communications. The character of these matters, dealing with aspects of utility service to the public, are technical in nature in contrast to the broader policy consideration motivating §605. Moreover, the very existence of those grants of authority to the States underscores the conclusion that had Congress intended to allow the States to make exceptions to §605, it would have said so. In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying §605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy. Cf. Pennsylvania v. Nelson, 350 U. S. 497 • • •."

In *Pennsylvania* v. *Nelson* (1956), 350 U. S. 497, Chief Justice WARREN, writing for the Court, restated the proper tests to be applied in determining whether, in the absence of an explicit statement by Congress of its intent to supersede state legislation, the latter survives.

Chief among these tests are the following: (1) is the "scheme of Federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"? (350 U. S., at p. 502); and (2) does the Federal statute "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject"? (350 U. S., at p. 504). (See, also, *Rice* v. *Santa Fe Elevator Corp.* [1947], 331 U. S. 218, 230, 231.)

Appellant's position is that applying the tests of the *Nelson* case to Section 605 of the Federal Communications Act as described in the *Benanti* case, it is apparent that the Federal Communications Act has preempted the field of the protection of the privacy of telephone conversations. The New York Court of Appeals in its opinion in the instant case has construed Penal Law, Section 1423, subdivision 6, as being intended to afford such protection. So construed, we submit that it is unconstitutional under the supremacy clause of the United States Constitution since it is in a field which has been preempted by the Federal Communications Act.

We note that if the Court of Appeals had construed Section 1423, subdivision 6, as a police measure, designed for the maintenance of domestic peace—*i.e.*, a malicious mischief statute—the statute might very well be held to be valid. (*San Diego Building Trades Council* v. *Garmon* [1959], — U. S. —, 3 L. Ed. 2d 775, 784; *United Automobile, Aircraft & Agricultural Implement Workers of America* v. *Wisconsin Employment Relations Board* [1956], 351 U. S. 266.)*

However, the Court of Appeals specifically rejected that construction of Section 1423, subdivision 6, even though the foregoing concession was made by the appellant in that Court. (See Appellant's Brief, Court of Appeals, pages 20,

* Had the New York court held that Section 1423, subdivision 6, was in fact a malicious mischief statute, it would have been obliged to reverse the conviction, under clear New York law, since the essential element of "wilfullness" meaning "malice" was never presented to the jury for its determination; the jury were instructed that "wilfullness" was equivalent to mere "intention." (See *Morisette* v. *United States* [1952], 342 U. S. 246, 274-276; *People* v. *Walker* [1910], 198 N. Y. 329, 334; *People* v. *Flack* [1891], 125 N. Y. 324, 334; *People* v. *Clemente* [1st Dept. 1954], 285 App. Div. 258, 264-265, aff'd 309 N. Y. 890.)

et seq.) Thus, the opinion of Judge FROESSEL, for the majority, contained the following statement:

> "We think it beyond dispute that the prohibition against wiretapping, as it existed in section 1423, subdivision 6, was primarily designed to protect the privacy of telephone conversations. This being so, the word 'wilfully', carried over from section 1423, subdivision 6, into the new statutory section forbidding 'eavesdropping',* would logically refer to an act consciously and deliberately done and would not include the element of malice. The invasion of privacy implicit in wiretapping is the same, whatever the motives of the unauthorized tapper may be."

Nor does anything turn on the fact that in *Benanti,* this Court held that Section 605 superseded *conflicting* state legislation, while Section 1423, subdivision 6, is *complementary,* rather than conflicting legislation.** Thus, in the *Nelson* case, *supra,* 350 U. S. 497, this Court pointed out that when Congress has taken a "particular subject matter in hand", supersession occurs, even where the state statute merely supplements, rather than opposes, the federal law. The Court wrote as follows (350 U. S., at p. 504):

> "* * * a state sedition statute is superseded regardless of whether it purports to supplement the federal law. As was said by Mr. Justice Holmes in Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 604:

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* The "new statutory section forbidding 'eavesdropping' ", referred to, is not involved in this case, but was adopted *after* the indictment herein was returned.

** Accordingly, the question, not decided, as to whether mere wiretapping alone, without "divulgence", is a violation of Section 605, is not important, even though wiretapping, without "divulgence", is a violation of the state statute.

> 'When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go.' "

See, also, *San Diego Building Trades Council* v. *Garmon*, *supra*, — U. S. —, 3 L. Ed. 2d 775, 781-782.

The substantiality of this federal question is indicated by the following excerpt from the opinion of Judge FULD, dissenting from the judgment of affirmance herein on other grounds:

> "The Supreme Court recently declared that the Federal Communications Act is 'a comprehensive scheme' for the regulation of both interstate and intrastate communications and, in addition, intimated that Congress, by enacting that statute, 'and Section 605 in particular,' has exercised its power to forbid wiretapping and prevent a State from authorizing wiretapping even in the exercise of its legitimate police functions. (*Benanti* v. *United States*, 355 U. S. 96, 104.) Such language, particularly when considered in the light of the authorities cited (355 U. S., at p. 106)—such as *Pennsylvania* v. *Nelson* (350 U. S. 497) and *Hill* v. *Florida* (325 U. S. 538)—gives me pause as to the correctness of the present holding that the Federal Government has not fully occupied the field of telephonic communications, including, of course, their interception. And, if Congress 'has taken the particular subject-matter in hand' (*Charleston & Car. R.R.* v. *Varnville Co.*, 237 U. S. 597, 604), it matters not, contrary to the intimations contained in the court's opinion (pp. 7-10), whether the state legislation is in conflict with the federal law or supplements it. (See, e.g., *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504,

supra; *Southern Railway Co.* v. *Railroad Commission*, 236 U. S. 439, 448; *Erie Railroad Co.* v. *New York*, 233 U. S. 67, 683, revg. 198 N. Y. 369, 381.) Nevertheless, until the Supreme Court has spoken more decisively on the subject, I hesitate to say that Congress has, through section 605, preempted the field so as to supersede and render ineffectual the provisions of this State's Constitution and Code of Criminal Procedure which authorize wiretapping (N. Y. State Const., Art. 1, §12; Code Crim. Pro., §813-a)."

There can be no question that this Court has jurisdiction of this appeal. 28 U. S. C. §1257 provides that "final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Court of Appeals is the highest court of the State of New York. It passed on the merits on appellant's claim that the statute under which he was convicted, if construed as protecting the privacy of telephone conversations, was repugnant to the Constitution and laws of the United States. It is of no moment, therefore, that this claim was not raised in the lower state courts. (*Whitfield* v. *Ohio* [1936], 297 U. S. 431, 435-436; *Home Insurance Co.* v. *Dick* [1930], 281 U. S. 397, 407; *Sully* v. *American National Bank* [1900], 178 U. S. 289, 298.) The decision was in favor of the validity of the state statute as so construed. Such ruling was essential to the disposition of the case, for

obviously if the statute were unconstitutional the conviction could not stand.

It is respectfully submitted that plenary consideration is warranted both because of the substantiality of the federal question and because of the importance of the problem raised. The instant issue is merely one more facet of the larger problem of the effect of Section 605 of the Federal Communications Act on the power of the states to deal with wiretapping, considered in *Benanti* v. *United States*, *supra*, 355 U. S. 96, in *Schwartz* v. *Texas* (1952), 344 U. S. 199, and in *Stemmer* v. *New York* (1949), 336 U. S. 963. It should be authoritatively determined whether both the federal and state governments may concurrently prosecute persons who, by wiretapping, invade the privacy of telephonic communication. Such a determination is particularly important in view of this Court's recent determinations that the double jeopardy provision of the Fifth Amendment does not preclude successive state and federal prosecution for the same acts. (*Abbate* v. *United States* [1959], — U. S. —, 3 L. Ed. 2d 729; *Bartkus* v. *Illinois* [1959], — U. S. —, 3 L. Ed. 2d 684.)

Respectfully submitted,

Sol Gelb,
Harris B. Steinberg,
Attorneys for Appellant,
25 Broad Street,
New York 4, New York.

Harris B. Steinberg,
Leo H. Hirsch, Jr.,
of Counsel.

June, 1959.

EXHIBIT A

STATE OF NEW YORK
COURT OF APPEALS

No. 342.

THE PEOPLE &c.,

Respondent,

—v.—

JOHN G. BRODY,

Appellant.

FROESSEL, *J.*:

Defendant was convicted of [1] one count of conspiracy in violation of Penal Law, section 580, subdivision 1; [2] 11 counts of aiding and employing others to wiretap unlawfully in violation of Penal Law, section 1423, subdivision 6; [3] 2 counts of using rooms and apparatus for unlawful wiretapping in violation of Penal Law, section 1423, subdivision 6; and [4] 2 counts of unlawfully possessing wiretapping instruments in violation of Penal Law, section 552-a, and sentenced to a total term of two to four years.

The evidence showed that with the aid of two telephone company employees, Ruh and Asmann, and an expert on telephonic communications and recording devices named Shannon, the defendant, who was an attorney and a private investigator, established and maintained wiretapping plants in two apartments in midtown Manhattan. Taps were

Exhibit A

placed on the telephones of business concerns such as Bristol-Meyers, E. R. Squibb, Inc., the Knoedler Art Gallaries and private individuals, including the chairman of the board of Pepsi Cola. Numerous recordings of telephone conversations were made for the purpose of securing information of value to defendant's clients.

All three accomplices testified against defendant. The testimony of other witnesses established, among other things, that defendant had rented one of the apartments under an assumed name and that special wiring had been installed there; that defendant employed messengers to transport packages—containing recordings of conversations, according to Shannon—from one of the apartments used as a wiretapping headquarters to defendant's office; and that defendant had negotiated with clients or prospective clients to supply them with information about the persons and concerns whose telephones were tapped. Defendant does not contest the legal sufficiency of the proof on this appeal, but attacks the validity of his conviction on other grounds.

His first contention relates to the meaning of the word "wilfully" in subdivision 6 of section 1423 of the Penal Law. That subdivision, as it read when the offenses were committed, made it a felony punishable by two years imprisonment to

> "unlawfully and *wilfully* cut, break, *tap* or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state" (emphasis supplied).

Exhibit A

The trial court charged the jury that

> "'Wilful' does not mean that a person does an act motivated by feelings of spite, malice or hate. It merely means intentionally doing an act and knowing that the act is being done".

An exception to the above definition was taken by the defense attorney.

Defendant argues that the word "wilfully", as used in subdivision 6, means "'wantonly' and 'maliciously', as differentiated from merely 'intentionally' or 'knowingly'", and that, because of the erroneous nature of its charge, the trial court "failed to submit an essential element of the crime to the jury for its consideration". He also argues for the first time that "wilfully" *must* be interpreted to mean "maliciously" to save the constitutionality of said section 1423, subdivision 6, since if the statute is construed as intended to protect the privacy of telephone conversations—as contended by respondent—rather than as a malicious mischief statute "intended to prevent harm to local property"—as contended by defendant—then it was preempted by the enactment of section 605 of the Federal Communicaitons Act and offends the supremacy clause of the Federal Constitution (Art. VI, Clause 2). He bases this contention on three decisions of the Supreme Court of the United States (*Benanti* v. *United States* [1957], 355 U. S. 96; *United Automobile, Aircraft & Agricultural Workers of America* v. *Wisconsin Employment Relations Board* [1956], 351 U. S. 266; *Pennsylvania* v. *Nelson* [1956], 350 U. S. 497) which were handed down between April 2, 1956, and December 9, 1957, before the affirmance by the Appellate Division in this case on May 13, 1958, 6 A. D. 2d 674.

Exhibit A

Section 1423 is found in Article 134 of the Penal Law, entitled "Malicious Mischief". That part of the section prohibiting wiretapping was inserted in 1892, long after the property damage provisions were enacted (Leg. Doc., 1956, No. 53, "Report of the N. Y. State Joint Legislative Committee to Study Illegal Interception of Communications", p. 13). The various subdivisions of section 1423 define a host of offenses involving injury or damage to highways, bridges, dams, sewers, telephone or telegraph lines and the like. All of these offenses, according to the language of the statute, must be committed *"wilfully or maliciously"* (emphasis supplied), *except* certain offenses like wiretapping, specified in subdivision 6, which must be committed "unlawfully and wilfully".

The word "wilfully", as used in the phrase "wilfully or maliciously" in section 1423 has been held to include the element of malice—*Wass* v. *Stephens*, 128 N. Y. 125, 129. That case, however, was decided in 1891, when every act in the statute had to be committed, according to its terms, "wilfully or maliciously". It was not until the following year (L. 1892, ch. 372) that the statute (then §639[7], Penal Code) was amended to include the telephone, and as to the tapping of a telephone the amendment merely required that it be done unlawfully and wilfully". And in *People* v. *Senes*, 210 App. Div. 845, affd. 242 N. Y. 556, which apparently was the only conviction for wiretapping ever reported in this State prior to the instant case (see Leg. Doc. No. 53, *supra*, pp. 14, 29), while the trial court instructed the jury that the word "wilfully", as used in the phrase "unlawfully and wilfully" in section 1423, included a malicious intent to injure someone, the correctness of this

charge was not raised on appeal since it was most favorable to defendant. No appellate court in this State has ever imported the element of malice into the word "wilfully" as used in the phrase "unlawfully and wilfully" in subdivision 6 of section 1423. By specifying that the crime of wiretapping was committed when one acted "unlawfully and wilfully", in contradistinction to the many crimes of property damage outlined in section 1423, which required that a person act "wilfully or maliciously", it is fair to assume that the Legislature indicated that the word "wilfully", as used in subdivision 6, meant deliberately, as opposed to maliciously or viciously.

Moreover, in *People* v. *Applebaum*, 277 App. Div. 43, aff'd. 301 N. Y. 738, it was recognized that section 1423, subdivision 6, was intended to protect the privacy of telephone conversations as well as to prohibit physical damage to telephone equipment. Defendant here concedes in effect that if the statutory provision prohibiting wiretapping was aimed at invasions of privacy, then the element of malice or spite, a natural ingredient of the many crimes of property damage listed in section 1423, would not be comprehended in the word "wilfully" as used in subdivision 6 of section 1423.

In 1957 the crime of wiretapping was taken out of section 1423, subdivision 6, and placed in a new article and section of the Penal Law (Art. 73, §738), entitled "Eavesdropping". The 1957 Interim Report of the Joint Legislative Committee on Illegal Interception of Communications (McKinney's 1957 Sess. Laws, pp. 1481-1484), insofar as relevant here, emphasized that one of the purposes of the

proposed legislation, subsequently enacted into law, was to "consolidate present scattered laws on interception of communications" (p. 1481), including

> "the rephrasing of the present law against wiretapping, *now inappropriately classified as malicious mischief, along with damage to sewers, water mains, and piers.*" (p. 1482, emphasis supplied.)

One of the objectives of the consolidation was to

> "*make it clear* that the evil of wiretapping is not merely in the offense against property but *particularly in the violation of privacy*—the eavesdropping." (p. 1481, emphasis supplied.)

We think it beyond dispute that the prohibition against wiretapping, as it existed in section 1423, subdivision 6, was primarily designed to protect the privacy of telephone conversations. This being so, the word "wilfully", carried over from section 1423, subdivision 6, into the new statutory section forbidding "eavesdropping", would logically refer to an act consciously and deliberately done and would not include the element of malice. The invasion of privacy implicit in wiretapping is the same, whatever the motives of the unauthorized tapper may be.

This brings us to the more serious question involved in this case, namely, whether the prohibition against wiretapping contained in section 1423, subdivision 6, intended to prevent invasions of privacy, was preempted by section 605 of the Federal Communications Act. That Act was enacted by Congress in 1934 (47 U.S.C.A.) and its main purpose was

> "to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio."

(*Weiss* v. *United States*, 308 U. S. 321, 328; see also *Benanti* v. *United States*, 355 U. S. 96, 104, fn. 14.) The Supreme Court has recently emphasized (*Benanti* v. *United States*, *supra*, at p. 104) that the Act "is a comprehensive scheme for the regulation of interstate communications".

Section 605 of the Act is entitled "Unauthorized *publication or use* of communications" (emphasis supplied), and that portion of Section 605 which is claimed to have preempted section 1423, subdivision 6, of our Penal Law reads as follows:

> "• • • no person not being authorized by the sender shall *intercept* any communication *and divulge or publish* the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person • • • " (emphasis supplied).

Section 501 of the Act makes a violation of Section 605 punishable by a $10,000 fine or imprisonment for one year or both and is applicable to

> "Any person who wilfully and knowingly does *or causes or suffers to be done* any act • • • in this chapter prohibited or declared to be unlawful • • • " (emphasis supplied).

In *Weiss* v. *United States*, *supra*, 308 U. S. at pp. 327 & 329, the Supreme Court held that the above quoted clause of Section 605 was applicable to the "interception and divulgence" of intrastate as well as interstate communi-

cations. Such a holding was necessary, explained the Court in the *Benanti* case (*supra*, 355 U. S. at pp. 104-105), "In order to safeguard those interests protected under Section 605", and in view of the practical consideration that "the intercepter cannot discern between the two and will listen to both".

The New York statutory scheme relative to wiretapping is far more comprehensive than Section 605 in that section 552-a (now §742) of the Penal Law renders criminal the possession of wiretapping instruments with intent to use them unlawfully, and section 1423, subdivision 6, punishes the use of rooms and apparatus for illegal wiretapping as well as wiretapping itself. We are here concerned only with whether Section 605 preempts that part of section 1423, subdivision 6, which makes it criminal to "tap, or make connection with any telegraph or telephone line, wire, cable or instrument". Twelve of the counts of which defendant was convicted charged substantive crimes of unlawful wiretapping, reciting specific interceptions between certain dates with respect to specific telephone numbers and subscribers, and it was on four of these counts that defendant was sentenced to a prison term.

In resolving the preemption issue, it is first necessary to decide the preliminary question of whether section 1423, subdivision 6, insofar as it prohibits wiretapping, impinges on Federal Jurisdiction. This question is important because it has been long established that

> "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal govern-

> ments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

(*United States* v. *Marigold*, 9 How. 560, 564. See also *Abbate* v. *United States*, — U. S. — [27 Law Week 4225], and *Bartkus* v. *Illinois*, — U. S. — [27 Law Week 4233], decided March 30, 1959, and pertinent cases therein cited; *Cross* v. *North Carolina*, 132 U. S. 131, 139; *Sexton* v. *California*, 189 U. S. 319, 322-323; *Southern Ry. Co.* v. *Railroad Comm. of Indiana*, 236 U. S. 439, 445; *People* v. *Welch*, 141 N. Y. 266, 276; *People* v. *Fury*, 279 N. Y. 433, 437.)

In *Pennsylvania* v. *Nelson*, 350 U. S. 497, where a state *sedition* statute was held preempted by the Smith Act, the Supreme Court pointed out, at the outset of their opinion (p. 500), that the decision in that case did not

> "prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power, as was done in *Fox* v. *Ohio*, 5 How. 410, and *Gilbert* v. *Minnesota*, 254 U. S. 325 * * *."

In discussing the two cited cases, the Supreme Court noted (pp. 500-501): "*In neither of those cases did the state statute impinge on federal jurisdiction.*" (Emphasis supplied.)

The question has a dual aspect in the instant case, namely, whether our penal provision against wiretapping impinges either on Federal *constitutional* jurisdiction under the commerce clause, or on Federal *criminal* jurisdiction under

Exhibit A

Section 605. As to the former, we do not look upon section 1423, subdivision 6, as an attempted regulation of telephonic communications, but simply as "a local police measure" designed to protect the people of this State against unwarranted intrusions into their privacy. As the Supreme Court noted in the *Nelson* case (350 U. S. at p. 517), in quoting from *Gilbert* v. *Minnesota, supra,*

> "To do so is not to usurp a National power, it is only to render a service to its people • • • ."

As to the possibility of encroachment on Federal criminal jurisdiction, the problem arises here because the nature of the offense made punishable by Section 605 of the Federal Act is not clear. While section 1423, subdivision 6, of our Penal Law clearly makes criminal the *act* of wiretapping, Section 605 seems to require both an interception *and* a divulgence or publication of

> "the existence, contents, substance, purport, effect, or meaning of such intercepted communication • • • ."

In other words, Section 605, on its face, does not appear to prohibit wiretapping as such, but seems to make it criminal only when the tapper divulges or publishes the existence of the tap or the information obtained (see article by former Atty. Gen. Brownell in 39 Cornell Law Quarterly at pp. 195, 197-198).

In the *Benanti* case, *supra*, which held that wiretap evidence was not admissible in a Federal court in a prosecution for a Federal crime, even when obtained by state law-enforcement officers under a court order, the Supreme

Court expressly left the issue open when it stated (355 U. S. at p. 100, fn. 5):

> "Because both an interception *and* a divulgence are present in this case we need not decide whether both elements are necessary for a violation of §605. Also because here the disclosure was of the existence of the communication, it is not necessary for us to reach the issue whether §605 is violated by an interception of the communication and a divulgence of its fruits without divulging the existence, contents, etc. of the communication."

(See also *Rathburn* v. *United States,* 355 U. S. 107, at p. 108, fn. 3.) It is clear, as noted, that section 1423, subdivision 6, is violated by an interception *alone,* whether or not there is a divulgence of the communication and/or its fruits. If Section 605, on the other hand, does not make criminal the act of wiretapping, then there would appear to be no impingement on Federal criminal jurisdiction.

A persuasive argument for reading Section 605 as requiring both an interception *and* a divulgence, in addition to the plain wording of the statute and its title, and the long established canon of construction that a penal statute must be strictly construed (*Yates* v. *United States,* 354 U. S. 298, 304-305), is that a contrary holding would result in making the act of divulging itself criminal, even when done by someone unrelated in any way to the interception of the communication. This would necessarily follow from a construction of the statute that made the act of interception *alone* criminal, since Section 605 forbids the interception *and* divulgence of a communication, and if interception alone is a crime so must divulgence alone also be a crime.

And the divulgence necessary to constitute the crime would not necessarily have to be of the *content* of the intercepted communication, since, as pointed out in the *Benanti* case (355 U. S. at p. 100), Section 605 "forbids the divulgence of 'the *existence* * * *' of the intercepted message" (emphasis in original). It is difficult to believe that in enacting Section 605 Congress meant to punish one who, having no part in the actual wiretapping itself, merely made it known that there had, in fact, been a tap.

Assuming *arguendo*, however, that section 1423, subdivision 6, of our Penal Law does impinge on Federal jurisdiction, we must then decide whether the Federal statutory provision was intended to supersede our statute. In the absence of Section 605 it seems clear that New York, as a legitimate exercise of its police power, could make wiretapping a crime so as to protect its citizens from the invasion of privacy implicit in wiretapping. Congress did enact Section 605, but in so doing it did not indicate whether it meant to preclude the states from themselves punishing wiretapping. Faced with a similar situation in the *Nelson* case, *supra* (350 U. S. at p. 501)—wherein it was noted: "Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate"—the Supreme Court invoked three criteria to aid in determining whether the State statute was superseded.

The first of these criteria (350 U. S. at p. 502) was whether

> " 'the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it' ".

Exhibit A

In the recent *Benanti* case (*supra*), in answer to the argument that the interception and divulgence involved in that case did not violate Section 605, since the state officers in placing the taps had acted pursuant to a court order authorizing them to wiretap (N. Y. Const., Art. 1, §12; N. Y. Code Crim. Pro., §813-a), the Court, in indicating that Section 605 evidenced a public policy against the interception and divulgence of communications, stated (355 U. S. at pp. 105-106):

> "that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would *contradict that section and that policy*" (emphasis supplied). [See, in this connection, *Schwartz* v. *Texas*, 344 U. S. 199; *People* v. *Variano*, — N. Y. 2d —.]

We do not think that, in so stating, the Court meant to imply that Section 605 was so pervasive as to preclude a state penal statute *punishing* wiretapping. It is, of course, true that once Congress has occupied a field, a state statute is superseded whether it contradicts or merely supplements the Federal statute (see *Pennsylvania* v. *Nelson*, *supra*, 350 U. S. at p. 504). But whether Congress has occupied the field to the exclusion of state laws is a matter of intention (see *California* v. *Zook*, 336 U. S. 725, at pp. 729-930), and reading the language in *Benanti* in context, we do not think it was intended to indicate that Congress had occupied the field of wiretapping. Certainly, when the single clause of Section 605 is compared with the broad sweep of the Smith Act and the Communist Control Act, the *Nelson* case is hardly persuasive authority for holding the states preempted from punishing wiretapping. The

Supreme Court, in the *Nelson* case, emphasized the *comprehensive nature* of Federal anti-subversive legislation in concluding (350 U. S. at p. 504) that,

> "Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it."

Unlike the New York statutory provisions, Section 605 does not attempt to deal with the preparatory and attendant activities essential to wiretapping, such as the acquisition of premises and equipment, the assembling of apparatus and the like. It is a general interdiction against the *interception and divulgence* of any type of "communication" and it does not, in our opinion, "evince a congressional plan" to occupy the field of wiretapping. On the contrary, we think it reasonable to assume that Congress intended to leave room for a state to punish the tapping of telephones within its borders.

The second criterion set forth in the *Nelson* case (350 U. S. p. 504) was whether

> "The federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject'."

In pointing to the "*all-embracing program* for resistance to the various forms of totalitarian aggression" (emphasis supplied) devised by Congress, the Court (*id.* p. 505) underlined the fact that

> "'Sedition against the United States is not a *local* offense. It is a crime against the *nation*.'" (Emphasis in original.)

Exhibit A

While it is true that, broadly speaking, interstate telephonic communications fall under the Federal aegis, and that Section 605, in order to be effective, applies equally to intrastate communications, this hardly imports that a state is powerless to protect the privacy of its own citizens by forbidding the tapping of telephones within the state. It would seem that protecting the individual's right of privacy is an area primarily entrusted to the care of the states rather than the Federal Government, falling logically within the ambit of the state's police power. In any case, the field of wiretapping would not appear to be so peculiarly affected with a Federal interest that state regulation "must be assumed" to be precluded.

The third and final criterion of supersession discussed in the *Nelson* case (*id.* at p. 505), was whether enforcement of the state statute "presents a serious danger of conflict with the administration of the federal program". We perceive no such "danger of conflict" here. Entirely lacking in the instant case is evidence of any requests to local authorities, by the President or the Director of the F.B.I., in the nature of those present in the *Nelson* case, to turn over to Federal authorities all information concerning wiretapping activities so as to "avoid a hampering of uniform enforcement of its program by sporadic local prosecutions" (*id.* pp. 506-509). The sparsity of prosecutions under Section 605 (see annotations in 47 U.S.C.A.) indicates the absence of any "federal program" to combat wiretapping, and the recent Congressional efforts at legislation in this field have been in the direction of legalizing wiretapping by Federal officers in certain circumstances

(39 Cornell Law Quarterly, *supra,* at p. 209, fn. 53). Permiting the states to punish wiretapping would appear to present none of the difficulties outlined by the Supreme Court in the *Nelson* case.

We cannot help but conclude that section 1423, subdivision 6, of our Penal Law punishes the conscious and deliberate tapping of telephones within the State and in so doing does not offend the supremacy clause of the Federal Constitution.

Defendant next attacks the court's charge to the jury on the grounds that it was too long, that it failed to indicate what evidence could be properly considered as corroborative of the testimony of the accomplices, and that it generally failed to relate the evidence to the question posed; as to the last ground, no exception was noted. We find no merit in these arguments. A reading of the charge as a whole demonstrates that it was clear as well as thorough, and provided the jury with a comprehensive summary of the evidence, the issues involved and the applicable legal principles. The court clearly and repeatedly charged that the corroborative proof necessary to convict had to be independent evidence tending to connect defendant with the commission of the crimes, and that evidence tending to show only that a crime was committed, as well as evidence of mere association of the accomplices with defendant, was insufficient.

Finally, defendant contends that he was deprived of a fair trial by several allegedly prejudicial remarks made by the prosecutor in his summation. In the first two chal-

lenged statements, the District Attorney, in reply to implications of the defense counsel that he had deliberately failed to call two material witnesses and had withheld evidence implicating one Gris as the real mastermind of the wiretap operations, improperly supported his case by the weight of his personal integrity and position (see *People* v. *Lovello*, 1 N. Y. 2d 426). No objection was registered to either of these statements, however, nor were they made the grounds of a motion for a mistrial; hence they are not open to us for review (*People* v. *Pindar*, 210 N. Y. 191, 196; *People* v. *Levine*, 297 N. Y. 144, 148; *People* v. *Tassiello*, 300 N. Y. 425; *People* v. *Lovello*, *supra*). As to the prosecutor's assertion of the "axiom" that in a hopeless case the tactic is to try the district attorney, there is also no ruling before us to review. The defense attorney's objection was sustained, the jury was instructed to disregard the statement, and the defense attorney not only failed to move for a mistrial but apparently acquiesced in the court's handling of the matter when he finally said "All right".

There are only two statements which were the subject of a motion for a mistrial and only two court rulings which we are enabled to review as rulings of law. One was the remark "How does he [defense attorney] know what I know, or I don't know?", to which no objection was taken at the time but which was made the subject of a motion for a mistrial at the close of the prosecutor's summation. The court denied the motion, but instructed the jury to disregard the remark. Defendant claims that under our decision in *People* v. *Tassiello*, *supra*, which cited *Berger* v. *United*

States, 325 U. S. 78, 88, his motion for a mistrial with respect to this remark "should have been granted, as a matter of right" since "the prosecutor was baldly hinting at his personal knowledge of matters outside the record which could well influence the jury's verdict".

Although the prosecutor's remark was uncalled for, it certainly lacks the prejudicial content of a claim of personal knowledge "that defendant's counsel • • • had become convinced of his client's guilt", as was the situation in *Lovello* (300 N. Y. at p. 430), or of a suggestion "that statements had been made to him [the district attorney] personally out of court", which was only one of many reprehensible tactics employed by the prosecutor in the *Berger* case (295 U. S. at p. 84). The trial court here instructed the jury to disregard the remark, and again cautioned the jury in its charge that "any suggestions • • • conveyed to your mind of things not in evidence • • • should be resolutely removed from any consideration by you". Under these circumstances, we are unable to say that the trial court abused its discretion in denying the motion for a mistrial.

The final claim of error relates to the prosecutor's remark:

> "I am the fellow you should convict if I deliberately permitted that man [Ruh] to commit perjury, knowing it in my heart and soul?",

as to which a motion for a mistrial was promptly made. This statement was similar to those made in the *Lovello* case. In sharp contrast to *Lovello*, however [and *People* v. *Swanson*, 278 App. Div. 846], where the court overruled the objection taken and thereby "indicated to the jury that

there was no impropriety" and "sustained, by his ruling, the district attorney in this line of argument" (*People* v. *Minkowitz*, 220 N. Y. 399, 405), the trial court here sustained the objection to the remark and twice instructed the jury to completely disregard, in their decision of the case, statements of personal belief by the attorneys. In its charge, the court again emphasized to the jury that they were not to be influenced by unsupported statements of counsel, and said further:

> "I repeat what I previously told you—what the lawyers said is not evidence. The evidence came from the witnesses and you alone are the sole judges as to what the witnesses testified and what the facts are."

In determining whether improper remarks in summation require a new trial, it would seem of vital significance whether the trial court, as stated by Judge Peck in his dissent in the *Lovello* case, "gave standing to the statement of the District Attorney as legitimate argument" (1 A. D. 2d at p. 167) or whether, as here, the trial court promptly advised the jury that the statement was improper and must be wholly disregarded. We thus conclude that the prompt and complete instructions of the trial court in the instant case, repeated in his charge, prevented the improper remark from having any serious consequence, and that the court did not abuse its discretion in denying the motion for a mistrial.

The judgment appealed from should be affirmed.

Exhibit A

COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOHN G. BRODY,

Defendant-Appellant.

FULD, *J.* (dissenting):

The Supreme Court recently declared that the Federal Communications Act is "a comprehensive scheme" for the regulation of both interstate and intrastate communications and, in addition, intimated that Congress, by enacting that statute, "and Section 605 in particular," has exercised its power to forbid wiretapping and prevent a State from authorizing wiretapping even in the exercise of its legitimate police functions. (*Benanti* v. *United States*, 355 U. S. 96, 104.) Such language, particularly when considered in the light of the authorities cited (355 U. S., at p. 106)—such as *Pennsylvania* v. *Nelson* (350 U. S. 497), and *Hill* v. *Florida* (325 U. S. 538)—give me pause as to the correctness of the present holding that the Federal Government has not fully occupied the field of telephonic communications, including, of course, their interception. And, if Congress "has taken the particular subject-matter in hand" (*Charleston & Car. R.R.* v. *Varnille Co.*, 237 U. S. 597, 604), it matters not, contrary to the intimations contained in the court's opinion

(pp. 7-10), whether the state legislation is in conflict with the federal law or supplements it. (See, e.g., *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504, *supra*; *Southern Railway Co.* v. *Railway Commission*, 236 U. S. 439, 448; *Erie Railroad Co.* v. *New York*, 233 U. S. 67, 683, revg. 198 N. Y. 369, 381.) Nevertheless, until the Supreme Court has spoken more decisively on the subject, I hesitate to say that Congress has, through section 605, preempted the field so as to supersede and render ineffectual the provisions of this State's Constitution and Code of Criminal Procedure which authorize wiretapping (N. Y. State Const., art. 1, §12; Code Crim. Pro., §813-a).

I do believe, however, that there should be a reversal of the judgment of conviction because of the statements made by the assistant district attorney during his summation, statements by which he made himself "an unsworn witness • • • supporting his case by his own veracity and position." (*People* v. *Lovello*, 1 N. Y. 2d 436, 439; see, also, *People* v. *Fassiello*, 300 N. Y. 425, 430.) More specifically, the prosecutor told the jurors that, if they believed that he or his associates had "suppressed" any evidence, they should "acquit this man. I am not worthy of standing here before you." And he compounded the impropriety of this comment by immediately adding that,

> "if they [the witnesses about whose failure to testify defense counsel had commented] had anything to contribute, they would be on that stand here before you. That is my duty, that is my duty to put them there, and if I didn't do it it is a damnable and shameful and outrageous thing and I should be convicted."

And, just a few minutes thereafter, the prosecutor again made himself a witness and again placed his own integrity and standing in the balance against the defendant by telling the jury that

> "Then I put Ruh on the stand and permitted him to testify that he did not tap those numbers. I am the fellow you should convict if I deliberately permitted that man to commit perjury, knowing it in my heart and my soul".[1]

All of these summation statements were highly improper and, when the one last quoted evoked a motion for a mistrial, more was required, in order to overcome and eliminate the prejudice which must have resulted, than the trial court's perfunctory instructions that the jury must rely on the evidence and disregard the comments. (See, e.g., *People* v. *Carborano*, 301 N. Y. 39, 42-43; *People* v. *Levan*, 295 N. Y. 26, 36.) "The virus • • • implanted in the minds of the jury," we wrote in the *Levan* case (295 N. Y., at p. 36), "is not so easily extracted."

DESMOND, *J.* (dissenting):

Because of the prosecutor's remarks during summation and because I concur in all that Judge Fuld is writing on that phase of the case, I dissent and vote to reverse. As to the preemption point, that has been taken out of this situation, finally and completely, by the United States Supreme Court's decisions (*Abbatte* v. *United States*, —

[1] This and the other remarks were quite similar to those condemned in *People* v. *Lovello* (1 N. Y. 2d 436, *supra*), but it should be noted that the trial against the present defendant was held some months before this court decided the *Lovello* case.

Exhibit A

U. S. — [27 Law Week 4225], and *Bartkus* v. *Illinois*, — U. S. — [27 Law Week 4233]).

* * * * *

Judgment affirmed. Opinion by Froessel, *J.*, in which Conway, Ch. *J.*, Dye and Van Voorhis, *JJ.*, concur; Burke, *J.*, concurring in result. Desmond, *J.*, dissents in a memorandum and Fuld, *J.*, in an opinion.

EXHIBIT B

New York Penal Law

Section 580, insofar as relevant, reads as follows:

"§580. **Definition and Punishment of Conspiracy.**

If two or more persons conspire:

1. To commit a crime; or,

* * * * *

Each of them is guilty of a misdemeanor."

The relevant portions of Section 1423 read as follows:

"§1423. **Injuring highway boundary, pier, seawall, dock, rock, buoy, landmark, mileboard, pipe, main, sewer, machine, telegraph or other property.**

A person who wilfully or maliciously displaces, removes, injures or destroys:

* * * * *

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state of any authorized message, communication, or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall use any such

telephone line to make calls to a place of business for the purpose of keeping busy the telephone line or lines thereto in an effort to injure such business by preventing, obstructing or delaying bona fide business calls; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned; * * * is punishable by imprisonment for not more than two years. * * *"

Section 552-a reads in this manner:

"A person who has in his possession any device, contrivance, machine or apparatus designed or commonly used for wire tapping or the interception of telephone communications under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for wire tapping or interception of telephone communications, or knowing the same are intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he shall be guilty of a felony."